IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO.301 OF 2005
IN
ARBITRATION PETITION NO.411 OF 2003

Tony Francis Guinness ....Appellant

V/s.

Ajay Kanoria & Ors. ....Respondents

Mr.Shyam Mehta with Mr.A. Patil, with Ms.C.K. Bhadha and Mr.S. Kasliwal i/b M/s.Advani & Co. for the Appellant.

Mr.Milind Sathe with Mr.Chirag Balsara and Mr.Anurag Gokhale for Respondent Nos.1 to 3.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 15TH APRIL, 2005.

P.C. :

1. This is an Appeal against the order of the learned single Judge dismissing the Appellant's Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "1996 Act") for setting aside the award dated 5.4.2003 passed by the learned sole Arbitrator. The learned Judge dismissed the Petition on the ground that it is barred by limitation. We are in respectful agreement with the

learned Judge.

2. In paragraph 11 of the Petition, the Petitioner stated that he received the award dated 5.4.2003 only on 21.8.2003. In paragraph 16 of the Petition, he stated that he became aware of the award on 21.8.2003 when he received a copy of the Execution Application filed in the High Court of Justice, Queens Bench Division, Commercial Court by Respondent Nos.1, 2 and 3.

3. In the affidavit in reply, the Respondents stated that the award was duly despatched by the Indian Council of Arbitration, under whose rules the Arbitration was conducted, under cover of a letter dated 24.4.2003 by registered airmail to Respondent Nos.1, 2, 4 and the Appellant. The award along with the said covering letter dated 24.4.2003 was also faxed to the Appellant on the fax number on which the earlier fax messages were sent to him.

4. Mr.Mehta, the learned counsel appearing on behalf of the Appellant, submitted that there was no proof of delivery of the said award by registered airmail. He submitted that even assuming that it ought to be presumed that the award was duly

despatched by registered airmail there was no evidence of the date on which it was received by the Appellant. Thus, he submitted, the Appellant's case that he received the award on 21.8.2003 ought to be accepted. In support of this submission, Mr.Mehta stated that pursuant to an enquiry from the Indian Council of Arbitration, the Senior Superintendent of the Post Office by his letter dated 22nd June, 2003 while confirming that the award had been duly despatched, requested for further information mentioned therein. He submitted that thereafter the Indian Council of Arbitration did not follow up with the Post Office and therefore, there could be no presumption about the date the award was received by the Appellant.

5. If the matter ended here, the Appellant would be entitled to succeed on the question of limitation. The matter however does not end here. Mr.Sathe, the learned counsel appearing for Respondent Nos.1 to 3 invited our attention to paragraph 12 of the affidavit in rejoinder filed by the Appellant which reads as under :-

> "12. I say that the letter dated 24.4.2003 from the Indian Council of Arbitration was not received by me until 21 August 2003. This was when I received the letter from Howard Kennedy, as mentioned above.

> Receipt of the letter from Howard Kennedy prompted me to go into the office of the Respondent No.4 and search for any other correspondence that might shed light on the matter. It was at this point that I found the letter dated 24.4.2001, as well as other letters." (emphasis supplied) (The date in the last sentence should read 24.4.2003 and not 24.4.2001.)

. It is important to note therefore that the Appellant in his rejoinder admitted that the letter dated 24.4.2003 from the Indian Council of Arbitration along with the award was received. The onus therefore was clearly on the Appellant to prove when he received the letter. He has chosen not to produce the envelope containing the letter. The envelope would have disclosed the date on which it was delivered to him. In these circumstances, an adverse inference against the Appellant is justified.

6. It is pertinent note Clause 28 of the agreement between the parties, which reads as under :-

> "Any such Notice shall be deemed given, in the case of delivery by registered first class airmail on the seventh Business Day after the day mailed, or in the case of courier service, on the Business Day received. Another address may be designed by a party from time to time by Notice given in accordance with the provisions of Clause 27.b".

7. This clause no doubt pertains to notices and correspondence between the parties inter-se. Strictly speaking it would not apply to the correspondence addressed by third parties including the Indian Council of Arbitration. However, we would be justified in applying the same yardstick in respect of the said letter dated 24.4.2003 especially when the Appellant himself has chosen not to disclose the evidence which would have established when the letter was actually delivered to him.

8. It is pertinent to note in this regard that the award was also faxed to the Appellant, a fact which he did not disclose in the Petition. In view of our above finding, we do not find it necessary to decide the further question raised by Mr.Sathe that a fax of the signed copy of the award would be in compliance with the provisions of Section 31 (5) of 1996, Act.

9. Mr.Mehta further submitted that the award is a nullity for various reasons. Mr.Mehta submitted that the question of nullity can be raised either in a Petition under Section 34 of 1996 Act and/or in collateral proceeding. Having held that the Petition

is barred by limitation, we do not feel called upon to decide this question either. We refrain from expressing any opinion on this issue, as we are of the view that the Petition being barred by limitation, it is not open to the Appellant to urge the same in these proceedings. If the submission is well founded, this order shall not prevent the Appellant from doing so.

10. In the circumstances, the Appeal is dismissed. There shall however be no order as to costs.